FILED
MAR 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-11429

IN THE

Supreme Court of the United States

KEITH LAVON BURGESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The government acknowledges that this Court, in several recent cases, has "relied on the rule of lenity to adopt constructions of mandatory or mandatory minimum sentencing statutes that favored the defendants." Gvt. Br. 41 n.18 (citing *United States v. Granderson*, 511 U.S. 39 (1994); *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398 (1980); and *Simpson v. United States*, 435 U.S. 6 (1978)). Indeed, it is an "ancient" and "venerable" principle of statutory construction that a penal statue applies only when it clearly and unambiguously requires imposing a certain punishment. *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (plurality opinion); *id.* at 310 (Scalia, J., concurring in part and concurring in the judgment). The government, however, urges this Court to abandon that line of sentencing jurisprudence and to relax the traditional conception of lenity in cases involving mandatory minimums. The government further urges that the statute at issue here, 21 U.S.C. § 841(b)(1)(A), applies to petitioner with unambiguous clarity.

Neither argument has merit. The rule of lenity properly dictates that mandatory-minimum provisions apply only when they clearly require the severe sentence at issue. If anything, the rule should apply with special force in the context of mandatory minimums. And the statute at issue here does not clearly and unambiguously apply to petitioner. It is not clear – in fact, it is simply not correct to say – that a state-law *misdemeanor* constitutes a "felony

drug offense" under Section 841(b)(1)(A) simply because it was punishable by more than one year.

I. The Rule of Lenity Dictates That Mandatory Minimum Provisions Apply Only When They Unambiguously Apply To A Defendant.

The government does not dispute that – as Professor Herbert Packer has summarized – courts have "traditionally" required a "clear statement" in penal statutes before applying them against individuals. Herbert L. Packer, The Limits of the Criminal Sanction 95 (1968). The government nonetheless insists (1) that a penal statute need not clearly apply to a defendant before it may be applied against him; and (2) that the rule of lenity "should have *less* force" than usual in the context of the mandatory minimum provision at issue here. Gvt. Br. 40-45. Neither argument withstands scrutiny.

1. The government argues that the rule of lenity applies "only when there is a grievous ambiguity in the statutory text" – a test the government construes as allowing it to punish an individual even when its interpretation of the statute at issue is not unambiguously correct. Gvt. Br. 44-45 (internal quotation marks omitted). The government's argument conflicts not only with the traditional conception of lenity (which is elaborated at Petr. Br. 27-29 and in the NACDL/FAMM amicus brief at 5-10), but also with decades of this Court's jurisprudence.

In one of this Court's first opinions elucidating the test for invoking the rule of lenity, Justice Holmes declared that "so far as possible" the line between punishable and non-punishable conduct "should be *clear*." *McBoyle v. United States*, 283 U.S.

25, 27 (1931) (emphasis added). Echoing Justice Holmes' prerequisite of clarity, Justice Frankfurter explained for this Court in a subsequent case that "if Congress does not fix the punishment for a federal offense *clearly and without ambiguity*, doubt will be resolved against [the government]." *Bell v. United States*, 349 U.S. 81, 84 (1955) (emphasis added). Numerous other cases have repeated this basic formulation and refused to apply – or refused to apply the harsher construction of – penal statutes in the absence of clear statements covering the conduct at issue. *See Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 409 (2003) ("only when Congress has spoken in clear and definite language"); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("clear and definite"); *Jones v. United States*, 529 U.S 848, 858 (2000) ("clear and definite"); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("only when Congress has spoken in clear and definite language"); *Dowling v. United States*, 473 U.S. 207, 214 (1985) ("clear and definite"); *United States v. Bass*, 404 U.S. 336, 347 (1971) ("clear and definite"); *Prince v. United States*, 352 U.S. 322, 329 (1957) ("clearly imports"); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 222 (1952) (requiring "language that is clear and definite").

Although the government asserts that "[t]his Court has never adopted" a rule requiring that Congress "provide a 'clear statement' of its intentions in sentencing statutes," Gvt. Br. 45 n.20, this Court has repeatedly held that the "clear statement" rule applies to sentencing statutes, just as it applies to those regulating primary conduct. *See Granderson*, 511 U.S. at 54 (government's proffered interpretation must be "unambiguously correct"); *Bifulco v. United*

States, 447 U.S. at 400 & n.17 ("unambiguous legislative decision" is necessary); *Busic*, 446 U.S. at 406-07 ("a clear and definite legislative directive" is necessary); *Simpson*, 435 U.S. at 15-16 ("a clear and definite legislative directive"); *Bell*, 349 U.S. at 84 ("clearly and without ambiguity").

Instead of genuinely confronting this long-standing line of "clear statement" jurisprudence, the government fastens onto the phrase "grievous ambiguity" to suggest that the rule of lenity actually tolerates a certain degree of ambiguity in penal statutes. To be sure, this Court has used that phrase in a few cases. *See Muscarello v. United States,* 524 U.S. 125, 139 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994)). The phrase derives from this Court's refusal in *Huddleston v. United States,* 415 U.S. 814 (1974), to apply the rule of lenity because – as this Court put it without reference to any prior precedents – it "perceive[d] no grievous ambiguity or uncertainty in the language and structure" of the statute in question. *Id.* at 831.

But nothing in *Huddleston* – or in any of the handful of other cases that since have quoted its "grievous ambiguity" passage – purported to adopt a new standard or to change the centuries-old test for invoking the rule of lenity. *Huddleston* itself acknowledged that "penal laws are to be construed strictly." *Id.* In the portion of the opinion reciting the test for triggering the rule of lenity, the Court cited *Bass* and other cases that require a "clear and definite" statement. *Bass,* 404 U.S. at 347; *see Huddleston,* 415 U.S. at 831 (citing *Bass*). Furthermore, *Huddleston* and the cases the government now cites declined to apply the rule of

lenity only after noting that "[t]he statute in question clearly proscribe[d] petitioner's conduct," *Huddleston,* 415 U.S. at 831, or that the statute was otherwise clearly unambiguous. *See also Muscarello,* 524 U.S. at 139 (conduct at issue fell within the "generally accepted contemporary meaning" of the statutory language); *Staples,* 511 U.S. at 619 n.17 ("Certainly, we have not concluded in the past that statutes silent with respect to *mens rea* are ambiguous."); *Chapman v. United States*, 500 U.S. 453, 459 (1991) (statutory interpretation offered by criminal defendant was "not a plausible one").

Accordingly, *Huddleston*'s "grievous ambiguity" passage is best understood as requiring merely that any doubt concerning the correctness of the government's proffered interpretation be a "*reasonable* doubt." *R. L. C.*, 503 U.S. at 305 (plurality opinion) (emphasis added; internal quotation marks omitted). The rule of lenity does not apply whenever a defendant can advance some "grammatical possibility" that a penal statute, when read in a vacuum, does not apply to him. *Caron v. United States,* 524 U.S. 308, 316 (1998); *cf. Victor v. Nebraska*, 511 U.S. 1, 20 (1994) (a reasonable doubt is not mere "fanciful conjecture," but rather "doubt that would cause a reasonable person to hesitate"). On the other hand, when language in a criminal law leaves this Court with "a reasonable doubt . . . about [the] statute's intended scope," then lenity requires this Court to adopt the statutory interpretation that absolves the defendant of the penalty at issue. *R. L. C.*, 503 U.S. at 305 (plurality opinion) (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *see also Bifulco,* 447 U.S. at 400 ("[T]o the extent that doubts remain, they must be resolved in accord with the rule of

lenity."). A reasonable doubt over whether the statute requires a defendant to spend years behind bars gives rise, by definition, to a grievous ambiguity.

2. The government does not offer any legitimate reason to relax the rule of lenity in the context of mandatory-minimum sentences. The government points out that mandatory-minimum statutes do not define "criminal" conduct in the sense of marking the borderline between innocent and prohibited conduct. Br. 41-42. But this Court has observed that "when viewed in terms of the potential difference in restrictions of personal liberty," distinctions between different kinds of criminal conduct "may be of greater importance than the difference between guilt or innocence for many [minor] crimes." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). It is elementary, therefore, that individuals deserve fair notice of factual circumstances or conduct that will *require* them to serve lengthy prison sentences instead of likely serving much shorter ones.

The government's additional suggestions (Br. 43-44) that lenity is less necessary in the context of mandatory punishments based on recidivism are exactly backwards. Plain statement rules are designed in part to require "unmistakably clear" evidence that Congress intended to upset a usual balance of constitutional powers. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). And the separation-of-powers concerns that animate the rule of lenity apply with particular force when the issue is whether a certain sentence is categorically required. Courts "tradition[ally]" exercise great discretion in sentencing defendants. *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (quoting *Koon v.*

United States, 518 U.S. 81, 113 (1996)). While Congress has the power to eliminate that discretion, courts should not assume it has exercised that power absent a clear indication – especially when, as here, courts retain both the duty to consider defendants' criminal histories and the ability to impose sentences as long as (or longer than) the mandatory minimum. *See* NACDL/FAMM Br. 18-19.

Furthermore, the rule of lenity, like other principles of statutory construction, is designed to preserve the role of the democratic process in determining the ultimate meaning of our laws. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162 (2002); *see also Granderson*, 511 U.S. at 60 (Scalia, J., concurring in the judgment) ("It is best" when faced with ambiguous criminal statutes "to let Congress make the needed repairs."). When this Court adopts the more lenient reading of an unclear mandatory-minimum statute, it does so secure in the knowledge that Congress is ready, willing, and able to amend the statute if it prefers a harsher interpretation. Statutory interpretations of penal statutes favoring criminal defendants, in fact, are "more likely to be legislatively overturned than any other type of statutory interpretation." Elhauge, *supra*, at 2194; *cf. Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (noting that "anticrime legislation is far more popular than legislation providing protections for" criminal defendants).[1]

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[1] For one example, see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984), § 1005, 98 Stat. 1976, 2138-39, *superseding Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978).

By contrast, if this Court interprets a criminal statute more harshly than Congress intended, the "overly broad interpretation . . . would likely stick" because repeat criminal offenders have little, if any, political influence. Elhauge, *supra*, at 2194. In many states, they cannot even vote. At the very least, therefore, "[t]he requirement of clear statement assures the legislature in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" at issue. *Bass*, 404 U.S. at 349.

II. The Mandatory-Minimum Requirement In Section 841(b)(1)(A) Does Not Clearly And Unambiguously Apply to Petitioner.

The government argues that Congress has plainly ordained that state-law *misdemeanors* punishable by more than one year constitute "felony drug offenses" under Section 841(b)(1)(A). In support of this argument, the government contends that the statute's "plain text," its context, its drafting history, and Congress's "reasonable policy objectives" all dictate this result. At the end of the day, however, the government's arguments demonstrate nothing more than that it has a reasonable counter-argument to petitioner's proposed reading of the statute – or, as Professor Karl Llewellyn famously observed, that for every canon of statutory construction, there is an equally valid counter-canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401 (1950); *see also Bell*, 349 U.S. at 83 (acknowledging that "argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions"). That demonstration –

strenuous and sustained as the government's thirty-page statutory argument may be – cannot overcome the rule of lenity.

A. It Is Textually Reasonable To Read "Felony Drug Offense" As Requiring That The Offense At Issue Be Classified As A Felony.

The government first argues that the CSA's plain text dictates that Section 802(44)'s one-year rule supplies "the exclusive meaning" of the phrase "felony drug offense" in Section 841(b)(1)(A). Br. 12. But each of the interpretive canons the government summons in service of this argument shows only that Congress drafted an unclear statute.

1. The government first invokes the canon that "[s]tatutory definitions control the meaning of statutory words," Br. 11 (citation and internal quotation marks omitted), and argues that because Section 802(44)'s definition of "felony drug offense" is "explicit" and "precise," courts "must follow that definition, even if it varies from that term's ordinary meaning." *Id.* at 11-12 (citation and internal quotation marks omitted). But this argument does not answer petitioner's claim that the definition of "felony" in Section 802(13) – requiring that an offense be classified as a felony in order to be a felony – *also* supplies meaning to the phrase "felony drug offense" in Section 841(b)(1)(A). Section 802(13) defines the term "felony" no less explicitly or precisely than Section 802(44) defines the term "felony drug offense." And the word "felony" appears in Section

841(b)(1)(A) just as surely as the phrase "felony drug offense" does.[2]

This Court has held that even when a statutory definition appears to define a term differently from its "everyday" usage, lenity requires the term to be construed in accordance with its everyday usage when that leads to a plausible and narrower result. *See McBoyle*, 283 U.S. at 26-27 (invoking lenity to construe "vehicle" so as not to apply to defendant who transported a stolen airplane). That principle, at the very least, controls here. The average citizen would not describe *misdemeanor* drug possession as a "felony drug offense." Because nothing in the CSA expressly renders that everyday understanding irrelevant to the meaning of the phrase "felony drug offense," the Court must resolve that lack of specification in favor of lenity.[3]

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[2] The government similarly maintains that only one subsection of the statute can define the phrase "felony drug offense" because the phrase is a "term of art." Br. 7, 11, 14, 15. But the government never explains why a term of art cannot derive its meaning from multiple relevant definitional sections.

[3] Citing cases and *Black's Law Dictionary*, the government insists that the "general definition of felony in federal criminal law" is a crime punishable by more than one year. Br. 13. But that general definition merely describes the reality that crimes that are classified as felonies typically are punishable by more than one year. In any event, the government's citation to nonstatutory sources contradicts its earlier argument that "[w]hen a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." Br. 11-12 (internal quotation marks and citation omitted). Section 802(13) explicitly defines "felony" as an offense classified as a felony.

2. Invoking the canon that "this Court ordinarily resist[s] reading words or elements into a statute that do not appear on its face," Br. 15 (internal quotation marks and citation omitted), the government next argues that Section 802(44)'s one-year rule must be the exclusive definition for "felony drug offense" in Section 841(b)(1)(A) because that definition gives meaning to each of the words in the phrase "felony drug offense." Br. 13. The government misses the mark here as well. The issue here is not whether this Court should read the word "felony" into Section 802(44). Instead, the issue is whether this Court should read the definition of "felony" into the phrase "felony drug offense" in Section 841(b)(1)(A). No insertion of new language is necessary to do that; the term "felony" already appears on the face of Section 841(b)(1)(A).

The government's argument also disregards common legislative practice. Contrary to the government's suggestion that Congress never separately defines terms within larger phrases that also are defined, Congress regularly separately defines statutory terms that are nested within larger defined phrases. Br. 17-18. And in such cases, as here, one must consult *both* provisions to comprehend the full meaning of the phrase at issue. For example, 2 U.S.C. § 1301 defines the term "employee" as "includ[ing] an applicant for employment and a former employee." The statute's definitional section then proceeds to define a series of more par-ticularized uses of that term, such as "employee of the Capitol Police" and "employee of the House of Represent-

atives." *Id.* §§ 1301(6)-(7).[4] Although none of those definitions uses the term "employee," it is sensible – even though those definitions refer in other ways to classes of individuals covered and thus could be viewed in isolation as comprehensive – to treat them as incorporating the definition of "employee."

Other statutes utilize the same approach. 18 U.S.C. § 2266 defines the term "[e]nter or leave Indian country" to "include[] leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government." *Id.* § 2266(3). Though this definition appears complete in itself, it is not: The statute also defines the more basic term "Indian country" ("The term 'Indian country' has the meaning stated in section 1151 of this title."), providing a second definition that fills out the meaning of the particularized term "[e]nter or leave Indian country." *See id.* §§ 2266(4), 1151. Similarly, 11 U.S.C. § 101(13) defines the term "debtor" as a "person or municipality concerning which a case under this title has been commenced" and then defines "debtor's principal residence" as "a residential structure, including incidental property, without regard to whether that structure is attached to real property." The former obviously complements the latter.

3. Nor does the government advance its cause by invoking the canon that when Congress wants to accomplish a certain result, it knows how to do it

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[4] Section 1301(6) provides: "The term 'employee of the Capitol Police' includes any member or officer of the Capitol Police." Section 1301(7) provides: "The term 'employee of the House of Representatives' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives . . . ."

expressly. It may be true, as the government suggests, that Congress could have explicitly stated its desire that the classification requirement in Section 802(13) apply to the phrase "felony drug offense" in Section 841(b)(1)(A). Br. 16-18. But the converse is also true. If Congress had wanted to render an offense's classification *irrelevant* to whether it triggered Section 841(b)(1)(A), it could have said that explicitly as well. For instance, the "career offender" provision of the United States Sentencing Guidelines provides that a defendant is a career offender if, *inter alia*, he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). An Application Note in that section provides: "'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, *regardless of whether such offense is specifically designated as a felony* and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 n.1. Congress's failure to use such language in Section 802(44) indicates that the classification requirement in Section 802(13) remains relevant to Section 841(b)(1)(A).

B. Statutory Context Supports Requiring An Offense To Be Classified As A Felony In Order To Constitute A "Felony Drug Offense."

The government next makes an argument based on "statutory context." It contends that Section 841(b)(1)(A)'s phrase "felony drug offense" cannot incorporate the felony-classification requirement in Section 802(13) because "Congress used the [phrase]

throughout the penalty provisions of the CSA and Import Act to provide for enhanced penalties for repeat offenders," Br. 22, whereas Congress "use[d] the (unadorned and defined) single term 'felony'" for "different purposes" – namely, "to define substantive offenses, to authorize certain punishments, and to provide certain powers to law enforcement authorities." Br. 24-25 (footnotes omitted). The government also makes the contextual argument that applying Section 802(13)'s classification requirement to those penalty provisions "would create significant uncertainty about the status of foreign offenses." Br. 20. Neither of these arguments adds any clarity to the statutory question here.

1. The government's suggestion that the unadorned term "felony" can only "define substantive offenses," "authorize certain punishments," and "provide certain powers to law enforcement authorities" manufactures a limitation that Congress did not itself impose. Nothing in the CSA says that those are the exclusive uses of the term "felony." To the contrary, Congress provided that the definition of "felony" in subsection (13) governs the word "[a]s used in this subchapter" without limitation. 21 U.S.C. § 802.

If anything, the statutory context of the CSA indicates that the term "felony," when used in conjunction with "drug offense," is meant to ensure that prior convictions triggering the imposition of severe mandatory-minimum sentences are actually classified as felonies. All of the penalty provisions in Section 841(b) aim to punish not just any drug-crime recidivism, but *serious* drug-crime recidivism. The substantive provisions thus speak explicitly to prior

"felony" drug offenses, rather than to just *any* prior offenses that are punishable by more than one year of imprisonment. *See* 21 U.S.C. §§ 841(b)(1)(A)-(D), 960(b)(1)-(3), 962(b). In that respect, it makes perfect sense to combine the felony-classification requirement in Section 802(13) with the "punishable by one year" requirement in Section 802(44) to identify those prior convictions that are sufficiently serious to trigger the categorical twenty-year minimum in Section 841(b)(1)(A).

The government's attempt to ignore the definition of "felony" in Section 802(13) also is difficult to square with this Court's decision in *United States v. Granderson*, 511 U.S. 39 (1994). In that case, the government advocated different constructions of the word "sentence" in the statutory phrases "sentence the defendant" and "original sentence" – arguing that "sentence" meant "sentence to imprisonment" in the former, but "sentence of probation" in the latter. *Id.* at 46. Because the government's position was not "unambiguously correct," *id.* at 54, this Court applied the rule of lenity in favor of the "construction [that] keeps constant the meaning of 'sentence'" in both phrases. *Id.* at 47. There is just as strong a justification to keep the meaning of "felony" – at least insofar as a prior offense must be classified as such – constant across all of the term's uses in the CSA. Retaining that classification requirement also would maintain consistency with other provisions of the U.S. Code requiring offenses to be classified as felonies in order to be treated as such.[5]

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[5] *See, e.g.*, 7 U.S.C. § 2015(k)(1) (individual is ineligible for food stamps if fleeing from prosecution or confinement for a crime "that is a felony under the law of the place from which the

2. Nor is the government correct that applying the felony-classification rule in Section 802(13) to Section 841(b)(1)(A) "would create significant uncertainty" concerning prior foreign convictions. Br. 20.

Because Section 802(13) does not mention foreign offenses and some foreign countries "do not distinguish between felonies and misdemeanors in their criminal laws," the government suggests that applying Section 802(13)'s classification requirement to Section 841(b)(1)(A) might mean that drug convictions from foreign countries – or at least those from countries that do not classify their crimes as felonies or non-felonies – could never trigger the mandatory minimum in Section 841(b)(1)(A). Gvt. Br. 20-21. Yet Section 841(b)(1)(A) has applied since 1984 to individuals with convictions for foreign "felony" drug offenses. *See* Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502(1)(B)(iii), 98 Stat. 1837, 2068. The one-year rule in Section 802(44) was not enacted until 1994.[6] And from 1984 to 1994, courts enforced Section 841(b)(1) with respect to prior serious drug offenses from foreign countries. *See, e.g., United States v. Moskovits*, 815 F. Supp. 147 (E.D. Pa. 1993) (applying enhancement based on prior conviction for Mexican drug offense). Courts also enforced Section 841(b)(1) with respect to prior serious drug offenses from jurisdictions that did not classify crimes as

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individual is fleeing"); 38 U.S.C. § 5313B(b)(1)(A) (same regarding veteran's benefits); 5 U.S.C. § 8148(b)(1) (ineligibility for worker's compensation if convicted "of an offense that constituted a felony under applicable law").

[6] As the government points out (Br. 29 n.9), the current Section 802(44) was initially codified in 1994 as Section 802(43).

felonies. Courts did so by analogizing such prior convictions to convictions from jurisdictions that do distinguish between felonies and non-felonies. *See, e.g.. United States v. Brown*, 937 F.2d 68 (2d Cir. 1991) (affirming enhancement based on prior conviction for drug possession under New Jersey regime that uses the term "high misdemeanor" rather than "felony").

Nothing about the changes in 1994 that added Section 802(44)'s one-year rule altered the legitimacy of that method of reasoning-by-analogy. Indeed, federal courts applying various types of statutes have become well accustomed to determining when offenses from jurisdictions that do not distinguish between felonies and misdemeanors should be treated as if they were classified as felonies. *See, e.g.*, *Hansen v. U.S. Parole Comm'n*, 904 F.2d 306 (5th Cir. 1990) (determining release date for citizen serving sentence for a foreign conviction by analogizing to similar federal sentencing law); 24 C.J.S. Crim. Law § 2310 (2006) (describing the comparisons courts use to assess the nature of foreign offenses). There is no reason why courts cannot continue to use this comparative method when necessary under the statutory scheme at issue here.

C. The Relevant Drafting History Provides No Clear Guidance Regarding What Constitutes A "Felony Drug Offense."

Even though Congress referred to the 1994 amendments to Section 841(b)(1)(A) as "Conforming Amendments," *see* Petr. Br. 4, the government asserts that the CSA's drafting history shows that Congress intended to expand significantly the reach of the twenty-year mandatory minimum in Section

841(b)(1)(A) to cover state-law misdemeanors punishable by more than one year. The government bases this assertion on the premise that Congress in 1994 "removed" or "deleted" the word "felony" from the definition of the phrase "felony drug offense." Gvt. Br. 29-31.

But this premise is incorrect. The definition of "felony drug offense" in Section 802(44) that Congress enacted in 1994 was brand new. Nothing could have been "removed" or "deleted" from it. What is more, when Congress enacted that definition in 1994, it *left in place* the pre-existing requirement in Section 802(13) that an offense be classified as a felony in order to constitute a "felony."

Stripped of its misleading locution, the government's position is merely that because Congress modified the CSA in 1994 to require that a "felony drug offense" be punishable by more than one year of imprisonment, it necessarily must also have meant to eliminate the requirement in Section 802(13) that such an offense had to be classified as a felony. But the broader drafting history of the CSA actually indicates that Congress did *not* intend to abrogate Section 802(13)'s felony-classification requirement. When Congress expanded Section 841(b)(1) in 1984 to cover state and foreign felonies, it explicitly stated its intention to do so in the legislative history. *See* S. Rep. No. 98-225, 258-59 (1984), *reprinted at* 1984 U.S.C.C.A.N. 3182, 3440-41. The government does not explain why, in 1994, Congress would have suddenly abandoned the definition of "felony" that had applied to Section 841(b)(1) for nearly twenty-five years, without so much as a whisper.

At the very least, Congress's failure clearly to signal any desire to repeal the statute's previously controlling definition of felony supports invoking the rule of lenity. This Court repeatedly has applied the rule of lenity to ambiguous statutes when a provision appears from its drafting history "not to have received Congress' careful attention." *See Granderson*, 511 U.S. at 42; *accord Bass*, 404 U.S. at 343-44. In *Granderson*, the provision at issue was a small portion of "a large and complex measure" that was "more like a telephone book than a piece of legislation" and was not discussed during the legislative process. 511 U.S. at 51 (internal quotation marks omitted). In *Bass*, the provision at issue was an amendment in omnibus legislation that received "little discussion, no hearings, and no report." 404 U.S. at 344. Likewise here, the Conforming Amendments to the "felony drug offense" provisions of the CSA amounted to barely one half of one page out of the 356 pages that comprised the Violent Crime Control and Law Enforcement Act of 1994. *See* 108 Stat. 1796, 1987-88. The amendments are not discussed anywhere in the legislative record.

In light of this indeterminate history, the government cannot credibly contend that Congress clearly intended in 1994 to repeal the requirement that an offense be classified as a felony in order to constitute a "felony drug offense" in Section 841(b)(1)(A). As this Court has noted, one "cannot pretend that all statutes are model statutes. While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking." *Bass*, 404 U.S. at 344.

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell*, 349 U.S. at 83.

D. Requiring An Offense To Be Classified As A Felony In Order To Constitute A "Felony Drug Offense" Advances Policy Objectives That Are At Least As Reasonable As Those The Government Advances.

The government contends that treating state-law misdemeanors punishable by more than one year as "felony drug offenses" furthers the "reasonable policy objectives" of imposing harsh punishment upon recidivists and ensuring that such punishment is applied "uniformly . . . across state lines." Gvt. Br. 33-35 (internal quotation marks and citation omitted). As an initial matter, however, this Court has long held that no policy objective can justify punishing a criminal defendant on the basis of a textually unclear statute, no matter how "much reason for supposing" that Congress would have desired such punishment. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820). As Chief Justice Marshall explained, the probable intent of Congress "is not a guide which a court, in construing a penal statute, can safely take." *Id.* at 105; *see also Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against [a defendant] on the basis of general declarations of policy.").

In any event, the first of the government's proffered objectives – punishing repeat drug

offenders severely – is, as in a previous lenity case, "easily answered." *Granderson*, 511 U.S. at 49. In *Granderson*, the government argued that a broad reading of a mandatory-minimum law was necessary to further a policy of "get[ting] tough on drug offenders." *Id.* This Court rejected that argument, reasoning that such a generalized policy did not provide "any reliable guidance" for interpreting "particular provisions" of the statute. *Id.* The same is true here. Section 841(b)(1)(A) will mandate severe punishment for numerous repeat drug offenders regardless of whether it is construed to cover defendants who have prior misdemeanor convictions. Consequently, there is no need to construe the statue broadly to achieve the government's proffered objective.

The government's second objective – uniformity – can be furthered *more* effectively under petitioner's position than under the government's. Requiring that prior offenses have been punishable by a certain amount of time *and* that they be classified as felonies produces more uniformity than requiring only the latter. Indeed, the government admits that the 1994 Conforming Amendments removed from the category of "felony drug offenses" those offenses classified as felonies but not subject to more than one year of imprisonment. Br. 37. This reflects Congress's apparent desire to ensure that mandatory-minimum sentences be reserved for individuals who had previously committed truly serious drug crimes.

What the government really must mean to argue is that its construction of Section 841(b)(1)(A) *adequately* serves the objective of uniformity because